IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 13TH SEPTEMBER 2007 / 22ND BHADRA 1929

CRL.A.No. 1041 of 1998()

C.C.2/93 ON THE FILE OF THE COURT OF THE JUDICIAL IST CLASS MAGISTRATE-I, THAMARASSERY.

CRA.74/1995 of COURT OF SESSIONS, KOZHIKOE DIVISION

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APPELLANT: ACCUSED:

E.A.AUGUSTY, S/O.AUGUSTY, IRUVELIKUNNERL HOUSE, THEKKUMKUTTY, ALLI P.O., MUKKOM.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: ACCUSED & STATE:

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1. USMAN K., KILIKKODE VEEDU, NAVAYI, NELLIKKAPARAMBA, MUKKOM.

2. STATE REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED FOR R2
ADV. SRI.C.P.MOHAMMED NIAS FOR R1

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-9-2007 , THE COURT ON 13/09/2007 DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl. A. No. 1041 of 1998

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Dated this the 13th day of September,2007

JUDGMENT

The appellant is the complainant in C.C.No. 2/93 on the file of the Judicial Magistrate of the First Class-I, Thamarassery. The appellant filed the complaint before the trial court alleging that the 1st respondent committed an offence punishable under section 138 of the Negotiable Instruments Act on the allegation that the 1st respondent borrowed an amount of Rs.30,000/- from the appellant and when the appellant demanded repayment of the amount, the 1st respondent issued Ext.P1 cheque to the appellant and when the cheque was presented for encashment, the same was dishonoured on the ground of insufficiency of funds in the account of the 1st respondent. After considering the evidence the trial court found that the 1st respondent guilty under section 138 of the Negotiable Instruments Act and he was convicted thereunder and sentenced to undergo simple imprisonment for six months and also to pay a fine of Rs.5,000/- and in default to undergo simple imprisonment for two months. Against the above findings the 1st respondent filed Crl.A.74/1995 before the Sessions Court, Kozhikode Division. The appellate court set aside the conviction and

sentence and acquitted the 1st respondent. Aggrieved by the above, the appellant has approached this Court.

2. This Court heard learned counsel for the appellant, learned counsel for the 1strespondent and learned Public Prosecutor.

3. The learned counsel for the appellant contends that the finding of the lower appellate court has erred in appreciating the evidence adduced on the side of the appellant. It is also contended that the lower appellate court ought to have considered the case of the appellant and the evidence adduced by the appellant. It is further contended that the finding of the lower appellate court that the case set up by the 1st respondent is more probable than the case of the appellant is not supported by any evidence.

4. The specific case of the appellant is that the 1st respondent had borrowed an amount of Rs.30,000/- and in discharge of the said debt Ext.P1 cheque was issued. The case set up by the 1st respondent is that the cheque in question was issued as a security for the transaction between the appellant and one Rajan who is none other than his friend.

5. PW1 is the complainant who had given evidence in tune with his complaint. PW2 had supported the evidence of PW1 and stated that PW1 gave Rs.30,000/- to the 1st respondent and in return the 1st respondent gave a cheque to the appellant in his presence. PW3 stated that he saw the 1st

respondent taking the amount from PW1. The trial court considered the above aspects and found that presumption under section 139 of the Negotiable Instruments Act was in favour of the appellant and the evidence of PWs.1 to 3 undoubtedly established that there was a legally enforceable debt due by the 1st respondent and towards the discharge of that debt the 1st respondent had issued Ext.P1 cheque in favour of PW1. The lower appellate court considered the evidence of PWs.1 to 3 and came to the conclusion that the appellant and the 1st respondent had great confidence in each other and hence the possibility of the 1st respondent handing over the cheque to the appellant in the circumstances pleaded by him could not be ruled out. PWs.1 and 2 had a definite case that the amount was obtained from PW2. It has come out in evidence that the amount was handed over to the appellant by PW2. Apart from the above, the lower appellate court has committed serious error in holding that "PW2, a labourer kept Rs.30,000/- with him from 1988 or 1989 till August 1991 when that amount is said to have been handed over to PW1". Hence, the above finding is not based on any evidence.

5. In the circumstances, this Court is of the view that the findings entered by the trial court are perverse and are liable to be set aside. Hence, the judgment under appeal is set aside and the matter is remitted to the

trial court for fresh consideration. The parties are permitted to furnish additional evidence, if any, to substantiate their case.

The parties shall appear before the trial court on 17-11-2007.

The records shall be forwarded to the trial court forthwith.

K. Thankappan,
Judge.

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K. Thankappan,J.

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Judgment
13-9-2007